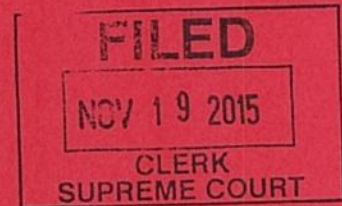


Kentucky Supreme Court
No. 2015-SC-000235



Jeffrey W. Murphy

Appellant

Appeal from Kentucky Court of Appeals
Case No. 2013-CA-001517
Appeal from Boone Circuit Court
Hon. James R. Schrand, Judge
Case No. 2013-CR-00190

v.

Commonwealth of Kentucky

Appellee

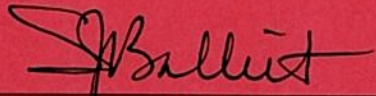
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Certificate required by CR 76.12(b)

This will certify that a true and correct copy of this Brief for Appellant was mailed, first class postage prepaid, to the Hon. James R. Schrand, Judge, Boone Circuit Court, Boone County Justice Center, 6025 Rogers Lane, Suite 447, Burlington, Kentucky 41005-8151; the Hon. Jeffrey W. Fichner, Assistant Commonwealth's Attorney, 54th Judicial Circuit, P. O. Box 168, Burlington, Kentucky 41005-0168; the Hon. Andrea M. Kendall, Assistant Public Advocate, 601 Washington Avenue, Suite 300, Newport, Kentucky, 41071; and the Hon. Leilani Karin Marie Martin, Assistant Attorney General, 1024 Capital Center Drive, Frankfort, Kentucky 40601, on November 19, 2015. The record on appeal has been returned to the Kentucky Supreme Court.



Susan Jackson Balliet

INTRODUCTION

Jeffrey Murphy entered a conditional plea of guilty to failure to register as a sex offender and was sentenced to a year in prison. The basis for the Kentucky charge was a juvenile offense for which he had previously been required to register in Michigan, but for which he would not have been required to register in Kentucky.

STATEMENT REGARDING ORAL ARGUMENT

Appellant requests oral argument. The case presents issues regarding the statutory interpretation of KRS 17.510(7), contained in Kentucky's Sex Offender Registration Act.

RECORD

Citations to the trial record are TR, page number. Citations to the CDs of trial proceedings are VR, date stamp, time stamp.

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STATEMENT OF THE CASE

In 2009 when Murphy was a child of 16, he engaged in consensual sexual misconduct with another child who was 13. No force was involved. Murphy was adjudicated delinquent in family court in Michigan.¹ Under Michigan Penal Code [MCL] 750.520d (1) his behavior constituted the statutory crime of “criminal sexual conduct in the third degree,” an age-based offense defined as sexual penetration of another child of at least 13 but under 16. In Michigan Murphy was required to register under Michigan’s Sex Offender Registration Act.² For the same offense committed in Kentucky, Murphy would **not** have been required to register. In Kentucky, the same behavior would have been considered sexual misconduct, a Class A misdemeanor under KRS 510.140. In Kentucky Murphy would not have been eligible for treatment as a youthful offender or transfer to adult court.

At 18, Murphy moved to Kentucky and was required to register as a sex offender in Boone County.³ He provided an updated address twice in November 2011, again in July 2011, and again in November 2012.⁴ But in February 2013 he became homeless.⁵ During a routine check, police learned he was not at the address he had listed.⁶ He was told to register, and two days later he was arrested.⁷ A Boone County grand jury indicted Murphy for failure to register as a convicted sex offender under KRS 17.510(11), a Class D felony punishable by one to five years in prison.⁸

¹ Order of Adjudication (Delinquency Proceeding) November 3, 2009, TR 30-32, attached to Motion to Dismiss Indictment, TR 25 – 35, collectively, at Tab 3.

² Motion to Dismiss Indictment, TR 25-35, at 25, Tab 3.

³ *Id.*

⁴ *Id.*

⁵ VR 5/1/13, 12:34:52

⁶ VR 5/1/13, 12:33:05

⁷ Warrant of Arrest, TR 2.

⁸ Boone County Indictment, TR 1 at Tab 4.

Murphy accepted a plea offer of a year to serve on the condition that he could challenge his duty to register as a sex offender in Kentucky.⁹ On August 27, 2013, the court entered an amended judgment and sentence of one year under KRS 17.510(11) for failure to comply with sex offender registration.¹⁰ Murphy served out his one-year sentence in a Kentucky prison and returned home to Michigan a convicted felon.

Meanwhile Murphy's appeal made its way through the Kentucky Court of Appeals (COA). In 2015 the COA denied relief, holding that Murphy was required to register in Michigan, and interpreting KRS 17.510(7) to require registration in Kentucky based on the fact that Michigan had required him to register:

Although KRS 17.510(6) and portions of (7) require a criminal conviction to trigger the registration requirement, Murphy was charged and convicted of violating SORA because he was required to register under the laws of Michigan and, therefore, required to register in Kentucky. Proof that a person is required to register in another state is sufficient to establish that person must register under KRS 17.510(7). *Commonwealth v. McBride*, 281 S.W.3d 799, 805 (Ky.2009).

Murphy v. Commonwealth, 2015 WL 1880690, at 2 (Ky.App. 2015) (unpublished).¹¹

The COA reasoned further that because KRS 635.040 states “[n]o adjudication by a juvenile session of District Court shall be deemed a conviction...” that statute does not exempt from registration any juvenile adjudication that occurred in any court other than a Kentucky District Court:

KRS 635.040 does not apply to Murphy because he was not adjudicated delinquent by a juvenile session of a Kentucky District Court. The term “District Court” contained in KRS 635.040 is not a generic term referring to any court in any

⁹ TR 62 and 63; see also Amended Final Judgment and Sentence of Imprisonment, TR 72-74, at Tab 2.

¹⁰ Amended Final Judgment and Sentence of Imprisonment, August 27, 2013, at Tab 2.

¹¹ *Murphy v. Commonwealth*, 2015 WL 1880690 (Ky.App. 2015) (unpublished), at Tab 1.

jurisdiction that adjudicates juveniles delinquent. Instead, “District Court” is a specific type of Kentucky court established by the Kentucky Constitution. Ky. Const. § 113. Its original jurisdiction includes jurisdiction over juvenile cases. KRS 24A.130; KRS 610.010. Accordingly, KRS 635.040 only applies to juvenile cases adjudicated before a District Court in Kentucky. Therefore, it cannot bar KRS 17.510(7) from operating where the basis of an out-of-state registration requirement was a juvenile adjudication in another state.

In denying relief, the COA also relied on a case that was non-final at that time, but has since become final, *Smith v. Commonwealth*, 2014 WL 4521235 (Ky.App. 2104) (unpublished).¹²

Our determination that Murphy can properly be required to register in Kentucky is supported by a recent unpublished case in Kentucky. *Smith v. Commonwealth*, 2012–CA–001811–MR, 2013–CA–000364–MR, 2014 WL 4521235 (Ky.App.2014) (unpublished), addresses this exact issue, albeit through constitutional challenges rather than on the basis of statutory interpretation.

Smith was required to register as a sex offender in Illinois based on his adjudication there as a juvenile delinquent for aggravated sexual abuse. *Smith*, 2014 WL 4521235 at 1. After he moved to Kentucky and failed to register as a sex offender, Smith entered conditional guilty pleas for failure to comply with SORA's registration requirements. Smith argued requiring his registration pursuant to SORA based on his juvenile adjudication in another state violated numerous constitutional provisions.

Rejecting his equal protection argument, this Court held that even if Smith could prove he would not have been required to register had he committed his offense in Kentucky, differential treatment could be justified as rationally related to a legitimate state interest because registration requirements are nonpunitive and provide protection to the public. *Id.* at 3–4. *See Hyatt v. Commonwealth*, 72 S.W.3d 566, 574 (Ky.2002). Smith's right to travel was not contravened by Kentucky's enactment of regulations to promote the public safety of its

¹² Copy of *Smith* attached pursuant to CR 76.28 at Tab 5.

citizens. *Smith*, 2014 WL 4521235 at 4. Therefore, the Court affirmed Smith's convictions.

Based on our statutory interpretation of the relevant statutes and *Smith*, we determine Murphy was properly convicted.

Murphy, at 2-3.

Murphy filed a motion for discretionary review, and his motion was granted on October 21, 2015.

ARGUMENT

1. Statutory Language, Context, History, and Public Policy Indicate KRS 17.510 Requires Registration Only for Adults and Youthful Offenders.

Preservation.

This issue is preserved. Trial counsel moved to dismiss Murphy's indictment on the ground that unlike Michigan, Kentucky exempts all juvenile adjudications from requiring sex offender registration. Murphy entered a conditional guilty plea reserving the right to appeal the question whether the language of KRS 17.510(7) required him to register. The trial court ruled against Murphy, and Murphy argued statutory interpretation in the Court of Appeals. The Court of Appeals ruled against Murphy "[b]ased on ... statutory interpretation of the relevant statutes and *Smith*...." Murphy asked for discretionary review.

Standard of review.

Statutory interpretation is an issue of law. Review of the circuit court's decision is therefore *de novo*. *Dever v. Commonwealth*, 300 S.W.3d 198, 202 (Ky. App. 2009).

Argument.

- a) The Language of Kentucky's SORA Indicates its Purpose is to Require Only Adults and Youthful Offenders to Register.**

The COA stated it was ruling against Murphy “[b]ased on our statutory interpretation of the relevant statutes” But apart from quoting KRS 17.510(7) and arbitrarily stating it requires sex offender registration based on an out-of-state juvenile adjudication, the COA opinion contains no statutory interpretation. Murphy argues that KRS 17.510(7) should not be interpreted to require an out-of-state juvenile offender to register in Kentucky. Under KRS 17.510(7) both in-state and out-of-state juvenile adjudications should be treated the same.

Kentucky’s SORA appears at KRS 17.500 through 17.580, and is entitled “Registration system for adults who have committed sex crimes or crimes against minors; persons required to register; manner of registration; penalties; notifications of violations required.” KRS 17.510.¹³ Sex offender registration is a civil disability ordinarily resulting from when an adult commits a sex offense against a child. *Commonwealth v. Baker*, 295 S.W.3d 437 (Ky. 2009). Overall, Kentucky’s SORA carefully focuses on adults and youthful offenders and methodically excludes juvenile adjudications from triggering a sex offender registration requirement. The SORA repeatedly refers to the requirement of an adult (or youthful offender) **conviction** to trigger a registration requirement. For instance,

- KRS 17.500(5) defines “registrant” to include only those who were convicted of a qualifying offense.

¹³ The title of Kentucky’s SORA, while not part of the law (see KRS 446.140) reflects the opinion of the statute reviser. *Arciero v. Hager*, 397 S.W.2d 50, 53 (Ky. 1965) *overruled on other grounds by Hicks v. Enlow*, 764 S.W.2d 68 (Ky. 1989).

- A “[s]exual offender” is defined in SORA as “any person **convicted** of, pleading guilty to, or entering an *Alford* plea to a sex crime...” KRS 17.500(9) (emphasis added).
- A website conveys the registrant’s “**conviction**.” KRS 17.580 (emphasis added).
- The period of registration is “based on the **conviction** in the foreign jurisdiction.” KRS 17.520(5) (emphasis added).

Nowhere does Kentucky’s SORA expressly require sex offender registration based on a juvenile adjudication.

In the Court of Appeals, Appellee pointed to an opinion by an intermediate court of appeals in Florida, *Turner v. State*, 937 So.2d 1184 (Fla.App. 2006), and argued that because Florida forced a juvenile offender from Minnesota to register even though he would not have been required to register in Florida, Kentucky should follow suit. But *Turner* is distinguishable. Unlike KRS 17.510 the language of Florida’s registration requirement expressly covered anyone who had been designated a sexual offender *in any manner*, including anyone who:

...has been designated as a sexual predator, as a sexually violent predator, **or by another sexual offender designation** in another state or jurisdiction and was, as a result of such designation, subjected to registration or community or public notification, or both, or would be if the person were a resident of that state or jurisdiction....

Turner, at 1185 (emphasis added).

By contrast, KRS 17.510(6), since 2006, has expressly required registration only of those who have been “convicted,” including adults and youthful offenders, and not juveniles.

KRS 17.510 governs registration requirements for all offenses regardless of where they occurred, in or outside Kentucky. Registration requirements for those with an out-of-state conviction moving to Kentucky appear in KRS 17.510(6) and (7). Consistent with the rest of the SORA, KRS 17.510(6) defines **who** is required to register as a sex offender as those who have been “**convicted**” of a sex crime or criminal offense against a minor in any state, including Kentucky:

Any person who has been **convicted** in a court of **any state** or territory, a court of the United States, or a similar conviction from a court of competent jurisdiction in any other country, or a court martial of the United States Armed Forces of a sex crime or criminal offense against a victim who is a minor **and** who has been notified of the duty to register by that state, territory, or court, or who has been committed as a sexually violent predator under the laws of another state, laws of a territory, or federal laws, or has a similar conviction from a court of competent jurisdiction in any other country, shall comply with the registration requirement of this section, including the requirements of subsection (4) of this section, and shall register with the appropriate local probation and parole office in the county of residence within five (5) working days of relocation....

KRS 17.510(6) (emphasis added).¹⁴

The words “juvenile” and “adjudication” do not appear in KRS 17.510. Nowhere does it appear that the legislature intended KRS 17.510 to apply to *any* juvenile adjudications. The thrust of KRS 17.510(7) is to define **when** the convicted felons already described in (6) are required to register in Kentucky, *i.e.*, not when they are here for a short visit or a vacation, but when they enter the state to change residence, for employment, vocation, or schooling:

¹⁴ In 2006 the first sentence of KRS 17.510(6) was amended from “another state” to “**any state**,” clarifying that the provisions apply identically to Kentucky and out-of-state convictions. 2006 Ky.Acts. Ch. 182, § 6

If a person is required to register under federal law or the laws of another state or territory, or if the person has been **convicted** of an offense under the laws of another state or territory that would require registration if committed in this Commonwealth, that person **upon changing residence from the other state or territory of the United States to the Commonwealth or upon entering the Commonwealth for employment, to carry on a vocation, or as a student** shall comply with the registration requirement of this section, including the requirements of subsection (4) of this section, and **shall register within five (5) working days** with the appropriate local probation and parole office in the county of **residence, employment, vocation, or schooling**. . . .

KRS 17.510(7) (emphasis added).

As can be seen, the Court of Appeals did not understand (7) as an explanation of the circumstances under which the people defined in (6) must register. Instead the COA interpreted (7) as *enlarging* the group described in (6) to include juveniles adjudicated outside Kentucky. As noted below, at most such an interpretation creates an ambiguity that must be resolved in favor of lenity. A better interpretation of (7) is that it was meant to delineate the circumstances (not short visits or vacations) and timing requirements (within five days) for those defined in (6) as having been convicted in any state.

By wrongfully interpreting subsection (7) as *broader* than subsection (6) by expanding the definition of those who are required to register, the Court of Appeals' interpretation leaves subsection (6) with no purpose. This must be incorrect, because when two statutes conflict, both must be construed so that **neither** becomes meaningless. *See Commonwealth v. Phon*, 17 S.W.3d 106, 108 (Ky. 2000). A seeming conflict between sections of the same statute must be harmonized if possible to give effect to both sections. *Lewis v. Jackson Energy Co-op. Corp.*, 189 S.W.3d 87, 91 (Ky. 2005), *citing*

DeStock No. 14, Inc. v. Logsdon, 993 S.W.2d 952 (Ky.1999). Subsection (7) cannot be interpreted as broader than (6) because doing so renders (6) ineffective and meaningless. The COA erred in its interpretation.

All presumptions must be indulged in favor of those for whose protection an enactment was made. *Firestone Textile Co. Div., Firestone Tire and Rubber Co. v. Meadows*, 666 SW2d 730 (Ky. 1983). This is especially true in the case of juveniles, for “whom the law throws every reasonable protection and in whose favor the tendency is to resolve every doubt.” *Elmore v. Commonwealth*, 282 Ky. 443, 138 S.W.2d 956, 961 (1940). When children under 18 in Kentucky are considered “youthful offenders,” their cases move out of district court and into circuit court where they are considered to possess the same culpability as adults. KRS 17.510 was enacted to define who is required to register in Kentucky based on an out-of-state offense, and also to protect *juveniles*, but over the years it has been amended so as *not* to protect youthful offenders. See discussion of legislative history, at argument e), *infra*.

b) When Two Parts of a Statute Appear to Conflict, They Must be Considered in the Context of the Whole Act.

The COA seized on the first sentence of KRS 17.510(7) and applied it literally, out of context. But the words of a statute are decisive only if they are clear. *Osborne v. Commonwealth*, 185 SW3d 645, 648 (Ky. 2006). Here the words are not clear, because subsections (6) and (7) of KRS 17.510 are in apparent conflict. KRS 17.510(6) clearly indicates the legislative intent that only a person with a *conviction* may be required to register as a sex offender, which would include adults and youthful offenders. But KRS 17.510(7) if read literally can be interpreted to require registration of juvenile adjudicants from other states, who have never been “convicted.” The implication in KRS 17.510(7)

that a person with a juvenile adjudication from another state must register in Kentucky if that other state requires registration clashes with the rest of KRS 17.510, with the SORA in general and with other Kentucky law.

Read in isolation, KRS 17.510(7) may appear to subject juvenile offenders who received their adjudication outside Kentucky to sex offender registration. But interpreted in that manner, it represents a substantial departure from otherwise clear legislative policy expressed in the SORA *as a whole* and elsewhere in Kentucky statutory law to require registration only of adults and to exempt juvenile adjudications as a basis for registration. In interpreting Kentucky's Sex Offender Registration Act (SORA) this Court must consider the act as a whole and the purpose to be accomplished. *Lafayette Football Boosters, Inc. v. Commonwealth*, 232 SW3d 550, 555 (Ky. App. 2007). Any language in the act is to be read in light of the whole act. *Popplewell's Alligator Dock No. 1, Inc. v. Revenue Cabinet*, 133 SW3d 456, 465 (Ky. 2004).

A departure from otherwise clear legislative policy automatically raises doubt and requires an examination of available information bearing on the purpose intended by the General Assembly. *Travelers Indem. Co. v. Reker*, 100 SW3d 756, 766 (Ky. 2003); *Swift v. Southeastern Greyhound Lines*, 171 SW2d 49, 51 (Ky. App. 1943). The legislative policy evident throughout the SORA as a whole and elsewhere, clearly, is to protect juveniles from the stigma of criminal conviction. Nowhere in the SORA or elsewhere does it appear the General Assembly intended to treat out-of-state juveniles who move to Kentucky more harshly than those already living here.

If the General Assembly intended to treat out-of-state offenders differently by subjecting them to sex offender registration along with adults and youthful offenders, it

would have used much clearer language. In *J.D.K. v. Commonwealth*, 54 S.W.3d 174, 176- 177 (Ky. App. 2001) the COA said as much, and cited a Kansas statute that applied to “any person convicted as an adult or adjudicated as a juvenile offender” as an example of the language the legislature would have had to use to require DNA collection from adjudicated public offenders. *Id.*, n. 1 (citing K.S.A. § 21-2511(a)):

Thus, by employing the words *convicted* and *felony*— words which the legislature itself has expressly defined and to which it has given technical meaning—it plainly intended that juveniles adjudicated in district court not be included in the DNA database.

J.D.K., at 176.

Similarly, Kentucky’s SORA consistently employs the word “convicted,” indicating reference to adults and youthful offenders, only. Nowhere does Kentucky’s SORA refer to adjudications or state that those who are adjudicated as juveniles should be required to register as sex offenders. Kentucky’s SORA contains overwhelming language to the contrary. Under *J.D.K.*, and *Travelers Indem. Co.*, cited above, KRS 17.510 should be interpreted as exempting all juvenile offenders from registration, regardless whether their adjudications are in-state or out-of-state.

c) KRS 635.040 Prohibits Imposing Sex Offender Registration Based on a Juvenile Adjudication.

The ambiguity caused by KRS 17.510(7) must be considered not only in the context of the whole SORA, but also in the context of other Kentucky law protecting juveniles from the stigma of criminal conviction. The Kentucky General Assembly exempts juvenile offenders from registration not only in the SORA, but also in KRS 635.040, which expressly mandates that **no juvenile adjudication** shall be deemed a conviction:

No adjudication by a juvenile session of District Court shall be deemed a conviction, nor shall such adjudication operate to impose any of the civil disabilities ordinarily resulting from a criminal conviction, nor shall any child be found guilty or be deemed a criminal by reason of such adjudication.

KRS 635.040.

KRS 635.040 consists of three independent clauses, each of which contains its own subject and verb, and each of which has independent meaning. The first clause prohibits considering a juvenile adjudication from being considered a conviction, and makes no distinction between in-state and out-of-state adjudications. The second clause of KRS 635.040— **nor shall such adjudication operate to impose any of the civil disabilities ordinarily resulting from a criminal conviction**— absolutely prohibits imposing sex offender registration based on a juvenile adjudication. Sex offender registration is a civil disability. *Baker*.

KRS 635.040 has consistently been interpreted to exclude juvenile adjudications whenever the terms “conviction,” “convicted criminal,” or “convicted of an offense” are employed. None of the prior cases place any controlling importance on what court rendered the juvenile adjudication. See *Phelps v. Commonwealth*, 125 S.W.3d 237 (Ky. 2004) (holding juvenile adjudication is not a “conviction” for purpose of second offense enhancement); *Manns v. Commonwealth*, 80 S.W.3d 439, 445-446 (Ky. 2002) (holding language in Kentucky Rules of Evidence permitting impeachment by prior “conviction” does not allow impeachment by “adjudication” of the juvenile court). And in *J.D.K.*, *supra*, KRS 17.170 was held **not** to allow collection of DNA from adjudicated offenders, but only from those “convicted . . . of a felony offense.” *Id.*, at 177. It is noteworthy that

because of its language, KRS 17.170 had to be *rewritten* in 2009 to expressly allow DNA to be collected from some (but not all) of those with juvenile adjudications in addition to those with adult convictions.

Sex offender registration is a civil disability ordinarily resulting when an adult is convicted of a sex offense against a child. *Baker*. Adults convicted of felonies are required to register as sex offenders under KRS 17A.500 *et.seq.*¹⁵ The manifest purpose of KRS 635.040, along with the strict confidentiality provisions of KRS Chapter 610, is to ensure that children do not suffer the same civil consequences they would suffer if they committed their crimes as adults.

By mandating in its third, final clause that “**nor shall any child be found guilty or be deemed a criminal by reason of such adjudication,**” KRS 635.040 mandates that a child who commits a crime, even a felony, shall **not** be deemed a criminal. The General Assembly clearly intended that **no child** whether originally from Kentucky or having moved here from somewhere else may suffer the results of being deemed a criminal, including any civil disabilities such as registration as a sex offender. The third clause encompasses statutes that have as an element the defendant’s status as a “felon” or a “criminal” such as Felon in Possession of a Firearm, KRS 527.040, and Persistent Felony Offender, KRS 532.080. *See Phelps*, at 240 (holding that a juvenile adjudication does not make one subject to a charge of Felon in Possession of a Firearm). The clause in KRS 635.040-- “nor shall any child ...be deemed a criminal....”—prohibits all commonplace civil disabilities resulting from a felony conviction, such as having to disclose prior offenses on a job application, and it also prohibits registration as a sex offender.

¹⁵ Adults also lose the right to vote, Ky.Const., § 145, and the right to bear arms, KRS 527.040.

In *J.D.K* this Court was asked to determine whether language in the DNA collection statute (KRS 17.170) requiring the state to take biological material from any person “convicted . . . of a felony offense” applied to juvenile adjudications. Reviewing KRS 635.040, the Court found that such language did not apply to juvenile offenders. The Court reasoned that: “by employing the words ‘convicted’ and ‘felony’ – words which the legislature itself has expressly defined and to which it has given technical meaning – it plainly intended that juveniles adjudicated in district court not be included in the DNA database.” *Id.* at 176. This Court said that “we believe that if the legislature had intended to include within the statute those minors adjudicated in juvenile court, *it would have articulated that intent clearly and unambiguously* as have legislatures in other jurisdictions.” *Id.* at 177 (emphasis added). Clearly this Court would not interpret KRS 17.170 to allow collection of DNA from out-of-state juveniles after forbidding DNA collection for juveniles in Kentucky.

The General Assembly did not state an intent to require out-of-state children to register in Kentucky as sex offenders. The COA erred by reading KRS 17.510(7) in the harshest possible way without considering its language or context. As a result, Murphy arrived in Kentucky a juvenile delinquent, and for failing to register as an adult sex offender within two days of a warning, he served a year in a Kentucky adult prison and returned home to Michigan a convicted felon.

d) The Rule of Lenity Requires Interpreting KRS 17.510(7) to Exclude All Juvenile Adjudications.

“The rule of lenity--a substantive canon of statutory interpretation--requires a court to resolve statutory and regulatory ambiguities in favor of criminal defendants.” Lisa K. Sachs *Strict Construction of the Rule of Lenity in the Interpretation of Environmental*

Crimes, 5 N.Y.U. Envtl. L.J. 600, 600-01 (1996) (internal footnotes omitted). The rule of lenity must be applied when, as here, there is ambiguity in a penal statute:

Most convincing, however, is the proposition that when “[i]t is not possible to determine which meaning the General Assembly intended ... the movant is entitled to the benefit of the ambiguity.”

White v. Commonwealth, 178 S.W.3d 470, 483-484 (Ky. 2005).

Lenity is a mandatory rule required by federal due process. *Bell v. United States*, 349 U.S. 81, 83 (1955) In *Bell* the Court said, “When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity”:

If a criminal statute or regulation does not clearly outlaw conduct, the defendant cannot be penalized. This rule ensures that a court does not extend the scope of a statute beyond clear legislative intent, and thus follows the separation of powers doctrine which mandates functional divisions among the legislative, judicial, and executive branches to ensure the liberty of a representative democracy. When properly applied, the rule of lenity also safeguards the procedural due process right to adequate notice of the type of conduct that may give rise to criminal punishment. These underlying constitutional policies are undercut, however, when courts narrowly apply the rule so that otherwise ambiguous statutory and regulatory language is interpreted against the defendant.

Sachs, 5 N.Y.U. Envtl. L.J. 600, 600-01.

In interpreting an ambiguous penal statute, doubt must be resolved in favor of the accused. *Kirby v. Commonwealth*, 132 SW3d 233, 236 (Ky. App. 2004). Doubts in the construction of a penal statute will be resolved in favor of lenity and against a construction that would produce extremely harsh or *incongruous* results or impose

punishments totally disproportionate to the gravity of the offense.” *Commonwealth v. Colonial Stores, Inc.*, 350 SW2d 465, 467 (Ky. 1961). (emphasis added)

As demonstrated above KRS 17.510(6) and (7) conflict in a way that raises doubt. Therefore interpretation is required. And when statutory provisions are in conflict, even in cases *not* involving juveniles Kentucky favors the more lenient interpretation. In *Stoker v. Commonwealth*, 828 S.W.2d 619 (Ky. 1992) two statutes were in conflict. KRS 532.055(2) said the jury “shall recommend whether the sentences shall be served concurrently or consecutively.” But KRS 532.110 said “consecutive sentences should not be permitted to accumulate endlessly.” *Id.*, 626-627. This Court applied the rule of lenity to hold that “where there are more than two offenses, some may be run concurrently and some consecutively....” *Id.* 627.

e) The Legislative History of KRS 17.510 Indicates the Sex Offender Registry was First Intended for Adults, and Later Included Youthful Offenders.

Reviewing legislative history is another useful method of statutory interpretation. “Where statutory language is unclear or the intent of the General Assembly cannot be discerned from the face of the statute, we look for guidance to outside sources, such as legislative history.” *White v. Check Holders, Inc.*, 996 SW2d 496, 497 (Ky. 1999); *cf.*, *Temperance League of Kentucky v. Perry*, 74 SW3d 730, 735 (Ky. 2002).

KRS 17.510 as originally enacted in 1994 expressly pertained only to those 18 or older at the time of their offense.¹⁶ It contained a subsection (5) that pertained to people convicted in other states and had similar wording to the current subsection (6), but

¹⁶ Original 1994 version of KRS 17.510, at Tab 6.

referred only to adults convicted in other states and released to Kentucky on parole or probation. In the 1994 version, there was no equivalent to the current subsection (7).¹⁷

In 1998, the subsections of KRS 17.510 were renumbered slightly so that subsection (5) became the modern subsection (6). But when read with the revised version of (5), subsection (6) was still limited to adults entering Kentucky in some kind of custodial arrangement, such as probation or parole.¹⁸ In 1998 subsection (7) was added and dealt with those coming from other jurisdictions who were required to register, but not under probation or parole. The 1998 version required registration when a residence was changed, and also when the individual was coming to Kentucky to work or go to school. The entire 1998 version of KRS 17.510 including subsections (6) and (7) still expressly applied only to adults over 18 at the time of their offense.¹⁹

In 2000, KRS 17.510 was again amended, removing the express requirement of being 18 at the time of the offense. But the intent behind this change appears to have been to include youthful offenders as registrants. Subsection (6) still defined those who must register as any person who has been “convicted,” which, with the 18 age requirement now eliminated, included youthful offenders.²⁰ Subsection (2) was modified to eliminate an affirmative statement of who had to register, and instead required “registrants” to register prior to release from custody. Sections (6) and (7) remained substantially unchanged from 1998.²¹

In 2006 subsection (6) was amended to change “another state” to “any state,” strongly indicating that those from out-of-state and those from Kentucky should be

¹⁷ *Id.*

¹⁸ 1998 version of KRS 17.510(2), at Tab 7.

¹⁹ *Id.*

²⁰ *Id.*

²¹ 2000 version of KRS 17.510, at Tab 8.

treated the same.²² Subsection (7) was amended to include a specific provision that persons entering Kentucky are presumed to know of the duty to register in Kentucky.

In summary, KRS 17.510(6) and (7) have not been changed since 2006, and the 2006 language, unchanged, applies in Murphy's case.

Based on the history of KRS 17.510, it appears subsection (6) was originally the provision describing out of state registration for probationers and parolees entering Kentucky, but evolved into the provision that describes who has to register in general, *i. e.*, adult convicts and youthful offenders. Subsection (7) appears to have been originally created to address people entering Kentucky with no official path to registration, and over time evolved into a provision that simply delimits the circumstances (not vacations or short visits) and timing (five days) for registration upon entering Kentucky.

These provisions were adopted in their current form prior to the adoption of the federal Adam Walsh Act in June 2006 by the U. S. Congress, the first federal mandate to register juvenile offenders. The federal Sex Offender Registration and Notification Act (SORNA), appear at 42 U.S.C. §16911 et seq. and mandates that **consensual sexual activity** that otherwise constitutes a sex crime, such as statutory rape, **does not require registration** under SORNA “**if the victim was at least 13 years old and the offender was not more than 4 years older than the victim.**” *Id.*, § 16911(5)(C) (emphasis added). Murphy's victim was 13, and Murphy was 16. Kentucky has not adopted SORNA, but if it ever does, the COA interpretation of KRS 17.510(7) would violate SORNA.

Contrary to the Court of Appeals' ruling, *Smith* is not merely distinguishable; it is irrelevant because it has nothing to do with statutory interpretation. *Smith* upholds KRS

²² 2006 version of KRS 17.510, at Tab 9.

17.510(7) against a five-pronged constitutional challenge, *Id.*, at 6. By contrast, Murphy's challenge is based on statutory interpretation. Even Murphy's constitutional argument—based on the rule of lenity—is a rule of statutory interpretation that was not raised in *Smith*.

The Court of Appeals also ruled against Smith, in part, because he could not show that if he had engaged in the same behavior in Kentucky, his case could not have been transferred out of district court to circuit court, *i.e.*, that he would not have qualified here as a youthful offender. By contrast, Murphy has shown he would not be eligible to be tried as a youthful offender in Kentucky. Murphy was not “convicted.” Nor would he have been eligible for transfer to adult court in Kentucky as a youthful offender. Nor was he committed as a sexually violent predator in Michigan. Under Michigan Penal Code [MCL] 750.520d (1) Murphy was adjudicated a juvenile delinquent for an age-based crime in which force was not an element. Kentucky does not consider the same behavior to be a felony. Murphy should not have been required to register under KRS 17.510(11).

f) Public Policy Supports Exempting All Juvenile Adjudications as a Basis for Registration.

Upholding an adult felony conviction for failure to register based on an out-of-state juvenile adjudication could have terrible consequences for Kentucky juveniles. For instance, a Kentucky child with a juvenile adjudication in Kentucky could move to Michigan, or Florida, and be required to register there under local state law. Upon returning to Kentucky, that same juvenile—who was previously not required to register under Kentucky's SORA—would suddenly be forced to register in Kentucky because he had been required to register in Michigan or Florida. Such a terrible result makes no

sense and illustrates the need for a uniform exemption of all juvenile adjudications, regardless of what state has rendered the juvenile adjudication.

Imposing a felony conviction on an out-of-state juvenile also exposes that juvenile to the public as if he or she were a convicted criminal. KRS 17.530 permits the Cabinet to share with the public all information gathered for the sex offender registry. Worse, under KRS 17.580 a website was established that displayed Murphy's Michigan juvenile adjudication as if it were an adult conviction, without explanation. Forcing Murphy to publicly register as a sex offender violated Kentucky's rehabilitative goal of treating all children, including children who move here, attend school here, or get a job here, differently than adult criminals. Kentucky's SORA clearly exempts juveniles "adjudicated" guilty of sex offenses from registration. Because of Kentucky's rehabilitative goals, its juvenile code makes "no distinctions ... between felonies, misdemeanors, or violations for the purposes of providing options to the court for disposition." *A.E. v. Commonwealth*, 860 S.W.2d 790, 793 (Ky.App. 1993); see KRS 635.060.

As discussed above, KRS 635.040 expressly forbids imposing any civil disability—such as sex offender registration—on juveniles adjudicated delinquent. The underlying policy of both the SORA and KRS 635.040 is Kentucky's emphasis on rehabilitation for juvenile offenders and the recognition that juveniles are typically not afforded the full range of procedural safeguards afforded to adults, a fact that renders juvenile adjudications *less reliable* than adult court convictions. "Juvenile offenders are not afforded all the constitutional rights that adult offenders receive." *Jefferson County Dept. for Human Services v. Carter*, 795 S.W.2d 59, 61 (Ky.1990). Specifically,

juveniles are not constitutionally entitled to a trial by jury. *McKeiver v. Pennsylvania*, 403 U.S. 528, 545 (1971). The *McKeiver* Court noted that the juvenile justice system is not perfect: “We must recognize, as the Court has recognized before, that the fond and idealistic hopes of the juvenile court proponents and early reformers of three generations ago have not been realized.” *McKeiver*, 403 U.S. at 543-44. The Court concluded that despite the shortcomings of the juvenile justice system, “we conclude that trial by jury in the juvenile court’s adjudicative stage is not a constitutional requirement.” *Id.* at 545. The Kentucky Juvenile Code states that juvenile court cases “shall be dealt with by the court without a jury.” KRS 610.070(1); *see also Dryden v. Commonwealth*, 435 S.W.2d 457, 461 (Ky.1968). Without full procedural safeguards, the risk of a false juvenile adjudication is undeniably higher than the risk of a false adjudication in adult court.

Like Kentucky, Michigan also provides fewer procedural safeguards to juveniles. Michigan allows juveniles to have a jury trial but only *by request*. Michigan clearly reflects the fact that juveniles have no federal due process constitutional right to a jury trial. In Michigan a juvenile’s attorney may decide to waive a jury, and consent by the juvenile is not required:

It is well settled that “the full panoply of constitutional rights” does not apply to juvenile proceedings. The applicable due process standard in juvenile proceedings is “fundamental fairness.”

Because there is no constitutional right to a jury trial in juvenile proceedings, the jury waiver process does not implicate constitutional concerns.

In re Whittaker, 607 N.W.2d 387, 389 (Mich. App. 1999) (internal citations omitted)

In Michigan Murphy did not have the same due process procedural protections as an adult would have had. For the same policy reasons that Kentucky applies to its own

children, Murphy's out-of-state juvenile adjudication should have been treated the same. Murphy should not have been required to register as an adult sex offender. The most sensible interpretation of KRS 17.510(7) is that it applies only to adult felons, or, as in the *Smith* case, the equivalent of a Kentucky youthful offender.

g) Application of Kentucky Law Exempting Out-of-State Juveniles from Registration is Also Required under Choice of Law Theory.

Kentucky is the state whose interests are primarily at stake here. *Major v. Commonwealth*, 275 S.W.3d 706, 714-16 (Ky. 2009) (applying Kentucky law to allow introduction of a phone call received by a defendant in Massachusetts, despite Massachusetts law to the contrary). Kentucky clearly has the most significant relationship to the question. Kentucky's SORA is designed to protect Kentucky residents, not Michigan residents, unless they move here. Kentucky's SORA exempts child offenders from registration in order to further its goal to allow for rehabilitation of those who were adjudicated delinquent as minors.

The Commentary to KRS 510.140 explains that sexual misconduct in Kentucky includes statutory rape cases when the victim is 13, 14, or 15 and the defendant is less than 18 years of age:

... [T]he basic purpose of KRS 510.140 is to preserve the concept of statutory rape and statutory sodomy. When read in conjunction with the rape and sodomy statutes, KRS 510.140 is designed primarily to prohibit nonconsensual sexual intercourse or deviate sexual intercourse under two circumstances: when the victim is 14 or 15 and the defendant is less than 21; **or when the victim is 12, 13, 14, or 15 and the defendant is less than 18 years of age.** In this context the ages of the defendant and the victim are critical. Force is not an element of this offense. The victim is statutorily incapable of consent. However, mistake as to age is a defense under KRS 510.030.

The purpose in denominating such conduct between persons within the specified age groups as sexual misconduct rather than rape or sodomy **is to eliminate an undesirable stigma**. In such cases the defendant may well have been persuaded by the “victim” to engage in the proscribed conduct. It seems unnecessarily harsh to have a defendant within the prescribed age limitation who has been convicted of such a statutory offense to bear a criminal record labeling him as a “rapist” or “sodomist.” KRS 510.140 takes a more realistic approach to the penalty imposed while at the same time prohibiting the undesirable conduct.

Commentary to KRS 510.140 (emphasis added).

Kentucky considers the crime committed by Murphy in Michigan to be a misdemeanor, like statutory rape. The Commentary makes clear that the legislative intent was “**to eliminate an undesirable stigma**” that might attach to a juvenile who commits this offense. Kentucky’s SORA—not Michigan’s—should apply to govern Murphy’s treatment in Kentucky.

In multi-state matters, Kentucky traditionally follows the Restatement (Second) of Conflict of Laws (1988). *Cf.*, *State Farm Mutual Auto. Ins. Co., v. Marley*, 151 S.W.3d 33, 42 (Ky.2004) (holding in a contract case that the “modern test is ‘which state has the most significant relationship to the transaction and the parties,’” and citing *Restatement of Conflict of Laws 2d*, sec. 188 (1971)). Michigan’s SORA required Murphy to register as a sex offender. But Kentucky’s law does not. Kentucky courts apply Kentucky law whenever doing so can be justified. *Breeding v. Massachusetts Indemnity and Life Insurance Company*, 633 S.W.2d 717, 719 (Ky. 1982) (“Justice, fairness and the best practical result may best be achieved by giving controlling effect to the law of the jurisdiction which, because of its relationship or contact with the occurrence or the parties, has the greatest concern with the specific issue raised in the litigation.”); *see also*

Johnson v. S.O.S. Transport, Inc., 926 F.2d 516, 519 n. 6 (6th Cir.1991) (“Kentucky’s conflict of law rules favor the application of its own law *whenever it can be justified.*”) (emphasis added). Given Kentucky’s strong public policy to protect juvenile offenders, it can certainly be justified in this case.

CONCLUSION

Because Murphy’s out-of-state offense was a juvenile adjudication, and he would not be considered a youthful offender in Kentucky, this Court should rule that sex offender registration—even though required in Michigan— was not required in Kentucky. Murphy asks the Court to reverse and dismiss his felony conviction under KRS 17.510(11) for failure to register in Kentucky as a sex offender.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "S. Balliet", with a horizontal line underneath.

Susan Jackson Balliet
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